No. 1937.

United States Circut Court of Appeals

FOR THE NINTH CIRCUIT

MAY TERM, 1911.

MAGGIE ELLEN PARR,
Appellant,

vs.

LOUIZA COLFAX,
Appellee.

BRIEF OF APPELLEE,
LOUIZA COLFAX Upon Rehearing.

Appealed from the United States Circuit Court for the District of Oregon.

R. J. SLATER, Solicitor for Appellee.

IN THE

United States Circut Court of Appeals

FOR THE NINTH CIRCUIT

MAGGIE ELLEN PARR,
Appellant,

vs.

LOUIZA COLFAX,
Appellee.

Brief on Behalf of Appellee on Rehearing

POINTS AND AUTHORITIES.

1.

The Courts of the United States have jurisdiction to determine who are entitled to the lands of deceased Indian allottees.

Act of Congress approved Aug. 15, 1894, 28 Stat. L. 305.

Act of Congress approved Feb. 6, 1901, 31 Stat. L., 761.

Patawa vs. United States, 132 Fed., 893.

Parr vs. United States, 132 Fed., 1004.

Smith vs. United States, 152 Fed., 889; 166 Fed., 846.

McKay vs. Kalyton, 204 U. S., 458, 51 L. Ed., 566.

Beam vs. U. S., 162 Fed., 260.

2.

The statutes giving the remedy are remedial and are to be liberally construed.

Sloan vs. United States, 118 Fed., 283.

Hy-utse-mie-kin vs. Smith, 194 U. S., 401, 48 L., 1039.

3.

The right of the heirs of Indian allottees, upon the Umatilla Indian reservation to take the lands of their ancesters by descent is confered by Act of Congress approved March 3, 1885. 23 Stat. L., 340.

Beam vs. U. S., 153 Fed., 414.

Smith vs. Bonifes, 154 Fed., 883.

4.

The rule of jurisdiction declared in McKay vs. Kalyton, 204 U. S., 458, 51 L. Ed., 566, is not changed by the Act of Junee 20, 1910, except to confer concurent jurisdiction upon the Secretary of the Interior, because, jurisdiction thereby is given to the Secretary affirmatively merely, and the Courts are not ousted of their jurisdiction either directly or by implication.

Black, Courts and Interpretation of Laws, p. ~~128~~./38, § 50

12 Ency. of Pl. and Pr., 176.

~~14 Cyc., 982.~~

Endlich on Interp. of Statutes Secs. 151, 152.

5.

A jurisdiction confered upon a special tribunal does not oust that of the Courts of general jurisdiction, unless there be a plainly manifested intention of the legislature to that effect, to be derived from the words of the statute.

Fidelity T. Co. vs. Gill Car. Co., 25 Fed., 737.

6.

An Act confering jurisdiction over a certain class of actions upon one court is not repealed by a subsequent act confering jurisdiction upon another Court.

Gowen vs. Harley, 56 Fed., 987.

7.

Where there are two acts refering to the same subject effect is to be given to both if possible.

Chicago M. & St. P. R. R. Co. vs. U. S., 127 U. S., 406, 32 L. Ed., 180.

U. S. vs. Henderson, 11 Wall., 652, 20 L. Ed., 235.

Smithmeyer vs. U. S., 147, 343, 37 L. Ed., 196.

Chew. Heong vs. U. S., 112 U. S., 536, 28 L. Ed. 772.

8.

The words final and conclusive does not mean exclusive.

McGaher vs. Mathis, 21 Ark., 40.

9.

The term, "And his decision shall be final and conclusive," means that there can be nothing further done in the executive department.

Manix vs. Hamilton County Commrs., 43 Ohio St., 210. 1 N. E., 322.

10.

The Act of June 25, 1910, is not retroctive.

Murry vs. Gibson, 15 How (U. S.) 421, 14 L. Ed., 755, 756.

Chew Heong vs. U. S., 112 U. S., 536, 28 L. Ed., 770.

6 Am. & Eng. Ency. of L. (2nd ed.) 939.

Endorsed on Inter. of Statutes 277, 288, 289, State v Littlefield 93 N.C. 614

ARGUMENT.

The rehearing in this case is for the purpose of enabling the Court to determine the question of jurisdiction.

As we understand it, the question now involved was suggested to this Court by a letter to His Honor, Judge Gilbert, by Hon. John McCourt, United States Attorney for the District of Oregon, under date of Feb. 8th, 1912, and we infer from the statements in that letter, a copy of which has been served upon

us, that it may be contended that the Court below did not have jurisdiction of this case by reason of the Act of Congress approved June 26th, 1910, as well as by the Act of Congress approved May 8, 1906, (34 Stat. L., 183), and it is also intimated that it might be considered an open question as to whetreh or not the United States Courts ever had jurisdiction of heirship cases under the Acts of Congress of August 15, 1894, and Feb. 6, 1901.

It seems therefore necessary for us to consider the question of jurisdiction at length and for that purpose we will present the propositions in the reverse order of that stated above, as follows:

First. Did the Act of Congress of August 15th, 1894, and Feb. 6, 1901, confer jurisdiction upon the Courts to determine the rights of the heirs of Indian allottees to the lands, originally allotted to their ancestors?

Second.—Did the Act of May 6, 1906, deprive the Courts of their jurisdiction if they had it prior to that date?

Third. Did the Act of June 26th, 1910, deprive the Courts of their jurisdiction if they had it at and prior to that date?

Fourth. If the Courts did have jurisdiction on and prior to June 26th, 1910, and were deprived of their jurisdiction by the Act of Congress of that date, did the Court below have jurisdiction to enter its decree in this case, *nunc pro tunc* as of the 14th day of June, 1910, which was the date the Court decided the case.

1st. We are therefore presented with four distinct questions, the first of which depends upon a proper construction of the Statutes of August 15, 1894, and February 6, 1901, which

are identical excepting that, the latter Act, so amends the first as to require the United States to be made "the party defendant."

The terms of the statute which we are to construe are as follows:

"That all persons who are in whole or in part of Indian blod or descent who are entitled to allotment of land, under any allotment act, or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit or proceeding, in relation to their rights thereto, in the proper Circuit Court of the United States. And said Courts are hereby given jurisdiction to try and determine any action, suit or proceeding arising within their respective jurisdiction, and involving the right of any person, in whole or in part., of Indian blood or descent, to any allotment of land under any law or treaty."

Those terms are so general and inclusive that it is difficult to imagine how any person either professional or lay could ever conceive of any one claiming as original donors or as their heirs or descendents are either excluded or not included within its very beneficial purview.

"Any person in whole or in part of Indian blood or descent," certainly must include the heirs of persons who are in whole or in part of Indian blood, and there are no words of limitations or of exclusion of any kind anyfhere in the statute.

The statute is remedial in that it supplies a very useful remedy where one did not exist prior to its enactment, and therefore it should be and has been liberally construed.

Sloan vs. United States, 118 Fed., 283.

Hy-ute-mic-kin vs. Smith, 194 U. S., 401, 48 L. Ed. 1039.

It only remains to ascertain whether there is any Act of Congress or Treaty which confers rights to lands, upon the heirs of Indian allottees, and if there is any such law, the right bestowed upon such persons to invoke the jurisdiction of the United States Court becomes manifest. In this case the right is conferred by the allotment act of March 3rd, 1885, which provides:

"Be it enacted, etc., that the President of the United States shall cause lands to be allotted to the confederated bands of Cayuse, Walla Walla and Umatilla Indians residing upon the Umatilla Reservation, in the State of Oregon, as follows, of agricultural lands:

"To each head of the family one hundred and sixty acres; to each single person over the age of eighteen years, eighty acres; to each orphan child being under eighteen years of age, eighty acres; and to each child under eighteen years of age not otherwise provided for, forty acres." "The President shall cause patents to issue to all persons to whom allotments of lands shall be made under the provisions of this act, which shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Oregon." (23 Stat. at L. 340).

It has been determined by this Court that whoever the heir or heirs of an Indian allottee may be, whether of Indian blood in whole or in part, or entirely of white blood, they are entitled to the land so allotted by virtue of the statute of descent of the State of Oregon.

Beam vs. U. S., 162 Fed., 260.

And in the case of McKay vs. Kalyton, 204 U. S., 458, 51 L. Ed., 566, the Supreme Court of the United States held that the United States Court had exclusive jurisdiction of such cases, under and by virtue of the Acts of Congress now under consideration, although in that case the distinctioin between the rights of original allottees and the heirs of original allottees was not raised, for it was assumed by all parties to that suit that that particular point had been settled in other cases, particularly in the case of Smith vs. Bonifer, 153 Fed., 889, in which it was ably argued by the late Hon. T. G. Hailey, and in the opinion by the late Judge Bellinger it is held: "The patent is a mere declaration of trust, in which the intention that the heir shall take in the right of the allottee is shown," and upon that construciion the judge held the complaint stated a good cause of suit as to F. H. Smith who was the heir of three of his deceased children. The case was affirmed by this court but the question of whether or not the statutes were broad enough to include cases of the heirs of the Indian allottees was not raised or discussed. 166 Fed., 846.

In the case of Parr vs. United States, 132 Fed., 1004, the point here presented was directly raised and elaborately argued, upon a demurrer to the complaint and the demurrer was overruled, the Court holding that the plaintiffs as the heirs of a deceased allottee had a right under the law to invoke the jurisdiction of the United States Courts under the Statute of 1894, (28 Stat. of L., 305), as amended by that act of February 6, 1910, (31 Stat. at L., 760).

In view oof these cases and the plain reading of the statutes, it is clear that unless it was divested by subsequent legislation the Court below did have jurisdiction of the subject matter of this suit.

2nd. We pass to a consideration of the second question involved here, viz.: Did the Act of May 8, 1906, deprive the Courts of jurisdiction?

The purpose of that statute was to change the time when allottees should become citizens. The former statute fixed the time as follows: "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal of the State or Territory in which they reside."

(See general allotment Act approved Feb. 8, 1887, Sec. 6.)

And as the amendment does not expressly or by implication effect or change the status of allottees under the law prior to the time eof the passage it can in no may have any application to the case at bar, for the record shows that the allotment in question was made in 1893, or about that time. But except in the manner above indicated the status of allottees made after its passage is in no way effected so as to deprive the United States Courts of their jurisdiction until patents in fee are issued and the Indian thereby entirely relieved from control by the United States. I find no suggestion in any case to the effect that the Act of May 8th, 1906, might have deprived the Courts of their jurisdiction. We therefore may confidentially dismiss the second question by ascerting that the rule laid down by the Supreme Court in McKay vs. Kalyton, supra, is not changed by the Act of May 8th, 1906.

3rd. Now, did the Act of June 26th, 1910, deprive the courts of the jurisdiction which had been confered upon them by the Act of August 15th, 1894, and as amended by the Act of Feb. 6th, 1901?

I am very confident that it does not. It certainly does not do so in direct, positive and unequivocal terms, and a reading of the Act, in the light of the law at the time of its enactment and the purposes intended by Congress, ought to, I think, convince any person that it only confers concurrent jurisdiction upon the Secretary of the Interior.

This question never arose in the case at bar prior to the decision in the lower Court for reasons which will hereafter appear, but subsequently to the decision it did arise in another case, Bond vs. United States, 181 Fed., 613, in which the writer of this brief had no interest, but at the time it was raised there were several cases pending of a like character to the Bond case, and several of them had been argued and submitted to Judge R. S. Bean, and in order to speed them he called upon all the attorneys for briefs upon this question, and thereupon the writer of this argument prepared a brief sustaining the position taken by him and every attorney having cases from the Umatilla Reservation, including Winter & Lowell, attorneys for the individual appellants in this case joined in that brief and I now present it to this Court, as being sufficient for the present purposes.

BRIEF UPON THE JURISDICTION OF THIS COURT OF CASES INVOLVING THE RIGHTS OF HEIRS OF INDIAN ALLOTTEES.

Whatever is said in this brief must be considered as applying to cases arising upon the Umatllla Indian Reservation, because all the cases in which the writers are interested arose upon that reservation, and the question now before this Court must be determined by considering the special statute under which the alotments upon that reservation were made, and also numerous cases which have been decided by this court, the Court of Appeals, and the Supreme Court of the United States.

The Act of Congress approved March 3, 1885, 23, Stat. L., 340, provides in Sec. 1 thereof, "The President shall cause patents to issue to all persons to whom allotments of lands shall be made under the provisions of this act, which shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of tweny-five years, in trust for the sole use and benefit of the Indian to whom such allotments shall have been mad, or in case of his decease, of his heirs according to the laws of the State of Oregon, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever; Provided that the law of alienation and descent in force in the State of Oregon shall apply thereto after the patents have been executed, except as herein otherwise provided," etc.

And Sec. 6 thereof declares, "That the Secretary of the Interior shall have power to make needful rules and regulations to carry into effect the provisions of this act, *and shalll have power to determine all disputes and questions arising between Indians representing their allotments.*"

Under the above provisions there can be no doubt but that originally the Secretary of the Interior, in the first instance, had exclusive jurisdiction to determine who the heirs of deceased allottees were; that question is definitely and for ever settled by the decision of the United States in Hy-uts-mil-kin vs. Smith, 194 U. S., 413, 48 L. ed., 1045, 24 Sup. Ct. Rep., 681, and in McKay vs. Kalyton, 204 U. S., 465, 51, L. Ed., 566, wherein the Supreme Court holds, "The sole authority for settling disputes concerning allotments resided in the Secretary of the Interior." "This being settled, it follows that prior to the Act of Congress of 1894 controversies necessarily involving a determination of the title, and incidentally of the right to the possession of Indian

allotments while the same were held in trust by the United States, were not primarily cognizable by any Court either State or Federal."

Now the terms of the Act of Congress of 1894 and the re-enactment thereof of Feb. 6, 1891, (3 Fed. Stat. Ann., 504), are as follows: "That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper Circuit Court of the United States; and said Circuit Courts are hereby given jurisdiction to try and determine any action, suit or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent to any allotment of land under any law or treaty and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant. And the judgment or decree of any such court in favor of any claimant to an allotmemt of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment ha dbeen allowed and approved by him."

The first question to determine is, what claimants or classes of claimants are brought within the jurisdiction of this Court by this act?

The words of the Act seem plain and unequivical; Congress meant just what it said, and the requirements are, the claimant must,

1. Be in whole or in part of Indian blood or descent.

2. Be entitled to an allotment under some law of Congress or must claim to be so entitled to land under some allotment Act or under some grant made by Congress, and

3. He must claim to have been unlawfully denied or excluded from an allotment or parcel of land to which he claims to be lawfully entitled by virtue eof an Act of Congress.

That part of the Act defining the jurisdiction could not be more comprehensive, viz.: "And said Circuit Courts are hereby given jurisdiction to try and determine any action, suit of proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment," etc. These terms are certainly broad enough to include any person or class of persons claiming an allotment as the heir of an allottee for there are no words of exclusion of any such claimant, and there are no subsequent words in the statute which limit the meaning of the words which define the jurisdiction which was conferred upon the Courts. The last clause which requires that the judgment or decree shall be certified to the Secretary of the Interior and that it shall have the same force and effect as though the allotment had been made by the Secrtary, was inserted in the Act of 1894 for the purpose of binding the United States, which under that act could not be made a party to the suit or action.

Hy-yu-tes-mil-kin vs, Smith, 194 U. S., 401, 48 L. Ed., 1039, those words only give effect to the judgment or decree and do not take away any of the force of any of the former provisions, neither is there any conflict of meaning which must be reconciled or construed. This interpretation was approved and applied by the Supreme Court in an heirship case, McKay vs. Kalyton, supra, wherein it is decided that the United States Courts have exclusive jurisdiction under the Acts quoted above.

Therefore, there can be no doubt but that the Acts of 1894 and 1901 do confer jurisdiction upon the United States Courts in such cases, and that such jurisdiction was, prior to the 25th day of June, 1910, exclusive of all other Courts or tribunals. Now upon the latter date Congress passed an Act which provides, "That when any Indian to whom an allotment of land has been made, or may hereafter be made, *dies* before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, *and his decision thereon shall be final and conclusive.*"

What effect has that statute upon the jurisdiction of this Court as conferred by the Acts of 1894 and 1901, is the question now presented.

One of th canons of the interpretation of statutes is a consideration of the law which existed prior to the enactment; we have done that in this matter and have found that originally the Secretary of the Interior had the exclusive jurisdiction, but that he was deprived of that jurisdiction and it was conferred upon the United States Circuit Court exclusively. McKay vs. Kalyton, supra.

That state of affairs was very embarrassing to the Department of Indian Affairs, for in the administration of the business of deceased allottees it is absolutely necessary that the Secretary of the Interor shall determine, in the first instance who the heirs of deceased allottees are or else the process of administration must necessarily stop; and again it is very apparent that under the present condition of the Indians upon the reservations in Oregon, a great majority of the cases would never be brought into court for various reasons, but princi-

pally, because there can be no doubt as to who the heirs are in many cases. Patawa vs. United States, 132 Fed. 893. And in many cases the heirs do not know of their interest and could not act, and in others minors without guardians or the possibility of guardians, could not act.

So that it is imperative that the Secretary of the Interior, for administrative purposes, should have the right and power in the first instance to determine who the heirs are of deceased allottees, and Congress, in taking away that right and jurisdiction by the enactment of the statutes of 1894 and 1901, probably went farther than it intended, and the law of June 15th, 1910, was intended to remedy the defect, not by depriving this court of the jurisdiction, but by giving the Secretary concurrent jurisdiction with the courts, for while there is an apparent necessity for the Secretary to have the right and power to determine who the heirs are in the first instance, there is a great necessity for the courts to have the same, or even paramount jurisdiction. That is very evident from the character of cases which are now pending before this court, wherein there are veery many of the most intricate questions of fact and law involved, requiring the most careful judicial investigation in order to rightfully determine who the real heirs are in such cases, and therefore we contend that this act of June 20th, 1910, must be so interpreted as to sustain both jurisdictions, if possible, and such in the rule of construction.

"Where there are two acts relating to the same subject, effect is to be given to both, if possible."

Chicago M. & St. P. R. Co. vs. U. S., 127 U. S., 406, 32 L. Ed., 180

United States vs. Henderson, 11 Wall., 652, 20 L. Ed. 235

Smithmeyer vs. United States, 147 U. S., 343, 37 L. Ed., 169.

Chew Heong vs. United States, 112 U. S., 536, 27 L. Ed., 772.

The special act conferring jurisdiction upon the United States Circuit Courts was not repealed (pro tanto) by the Act of June 20th, 1910, which confers jurisdiction upon the Secretary of the Interior, and the two stand together, Id.

When jurisdiction is once conferred, it cannot be taken away by implication, but such a result can only be reached by express negative words or by irresistible implications from the terms of the statute. 12 P. & P., 176; ~~11 Cyc., 923~~.

No statute will be construed as repealing a prior law, unless so clearly repugnant thereto as to admit of no other construction. Cope vs. Cope, 137 U. S., 682, 34 L. Ed. 832.

And "It is a general rule of law that a jurisdiction conferred upon a special tribunal does not oust that of the Courts of general jurisdiction, unless there be a plainly manifested intention of the legislature to that effect, to be derived from the words of the statute."

Fidelity Trust Co. vs. Gill Car. Co., 25 Fed., 737.

Also "An act conferring jurisdiction over a certain class of actions upon one court is not repealed by a subsequent act conferring jurisdiction upon another Court." Gowen vs. Harley, 56 Fed., 879.

There is no express declaration in the statute under consideration whereby the jurisdiction of the Court is affected, and the only expression from which such an intention might possibly be implied are the words, "And his decision shall be final and conclusive"; we must, therefore, understand what is the meaning of those words, when used as they are here to declare the effect of a statutory enactment.

Our contention is that the words referred to are not equivalent to *exclusive,* and can refer in any event only to such decisions as the Secretary of the Interior may render in any particular case which might come before him; it may mean that such a decision shall be final and conclusive to the exclusion of any further investigation in the courts, of any particular case tried out by the Secretary, but that does not mean that the Court is deprived of jurisdiction to try other cases of a like nature, and certainly it could not be more final and conclusive than the decision of the Courts in similar cases.

"Final" and "Conclusive" mean the same thing.

Hilliard vs. Beattie, 58 N. H., 112.

"A statutory provision that the decision of tax inspectors shall be *final* on a question of assessment only concludes further nvestigation by the ministerial officers, and does not debar a party, feeling himself aggrieved in the assessment of his property, from the privilege of prosecuting or defending his rights in th Courts."

McGahee vs. Mathis, 21 Ark., 40.

"And his decision shall be final and conclusive" means that there can be nothing further done in the executive departmnt, and does not mean that there is no resort to Courts of competent jurisdiction.

Manix vs. Hamilton County Commissioners, 43 Ohio St., 210, 1 N. E., 322.

But the question as to whether or not the Court had jurisdiction to reverse a decision of the Secretary in any such case is not now before this Court.

It seems certain and beyond doubt that the jurisdiction of

cases involving the rights of the heirs of Indian allottees is concurrent in the Circuit Courts and the Secretary of the Interior.

We make the further point that the Act of June 25th, 1910, is prospective and applies only to such cases as arise after the approval of the act, and has no application to suits already pending in this Court. This is evident from the use of the word "dies," which by its meaning must refer to allottees who die and not to allottees who have died; "dies" includes all allottees who shall die after the passage of the act, and excludes all allottees who have died prior thereto.

"Expressio unius est exclusio alterius.

The expression of one thing is the exclusion of another."

"As a general rule for the interpretation of statutes, it may be laid down that they never should be allowed a retrospective operation where this is not required by express command or by necessary and unavoidable implication. Without such command or implication they speak and operate upon the future only." Murry vs. Gibson, 15 How (U. S.) 421, 14 L. Ed., 755, 756.

U. S. Hong vs. U. S., 112 U. S., 536, 28 L. Ed., 770.

6 Am. & Eng. of L., 939 (2nd ed.)

We therefore most respectfully submit to this Court that the acts of Congress of 1894 and 1901, do confer jurisdiction upon the Circuit Courts of the United States of all cases involving controversies as to who the heirs are of Indian allottees, and that the act of June 25th, 1910, does not deprive the Courts of that jurisdiction, but it does confer jurisdiction upon the Secretary of the Interior of cases arising by the death of allottees after the passage of that act, but that such jurisdiction is not exclusive, but is concurrent with the Courts.

The foregoing brief was signed by myself and Winter & Lowell and others and submitted to the lower Court, as friends of the Court and I do not think it possible in the brief time at my disposal to improve upon it ,but I will add the further point, statutes which merely give jurisdiction affirmatively to one Court do not oust that already existing in another. Black Constr. and Interpretation of Laws, p. 123.

4th. So far I have treated the subject as though the question of jurisdiction was raised or might have been raised in the Court below in this case, but the record does not show that it was raised at the hearing, but as heretofore shown it was suggested afterwards upon the entry of the decree *nunc pro tunc*. As to the first two points it might have been raised at the final hearing but was not for the obvious reason that all persons concerned considered the question settled; that is, all understood and acquiessed in the conclusion that the Court did have jurisdiction of the so-called heirship cases.

AS TO THE EFFECT OF THE STATUTE OF JUNE 20th, 1910, IT WAS NOT RAISED AND COULD NOT HAVE BEEN RAISED IN THIS CASE AT THE FINAL HEARING OR AT ANY TIME PRIOR TO THAT TIME, OR AT THE TIME OF THE FINAL DECISION OR ANY TIME PRIOR THERETO, for the very potent reason that His Honor, Judge R. S. Bean handed down his decision on the 13th day of June, 1910, (Transcript of Record, p. 14), but the decree by oversight of the Clerk was not entered, and before it was entered the Act of June 20th, 1910, took effect and the question arose then as to whether or not the Court had jurisdiction to enter the decree in this case *nunc pro tunc* as of a day prior to June 20th, 1910, and all agreed that it did have such jurisdiction even though the jurisdiction of the subject matter had been taken away by the Act. That conclusion was arrived at under the general principle.

"*A nunc pro tunc* order is admisable when delay has arisen from the act of the Court." Brignardello vs. Gray, 1 Wall., 627, 17 L. Ed., 692.

"*Actus curiae neminem gravibat,*" Mitchell vs. Overman, 103 U. S. 62. 26 L. Ed., 367, 368, and authorities cited in note.

If the propositions above set out are correct there can be no possible doubt as to the jurisdiction of the Court blow and of this Court upon appeal and since the question has been suggester it is important to the executive department and to Indians who claim as heirs that the queston shall be determined.

Most respectfully submitted,

R. J. SLATER,

Solicitor for Cross Complainant.